No. 88-1134 (3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

LESTER W. SMITH and WESTERN RESERVE GROUP, INC.,
Petitioners,

vs.

COMBUSTION ENGINEERING, INC., C-E CAST EQUIPMENT, JAMES F. CALVERT, GEORGE E. FISHER, JR., LAWRENCE K. HUBBELL, EDWIN M. KAVANAGH, JAMES B. KELLY, JAMES E. KLIMA, THOMAS E. McGRANAHAN, WILLIAM FRANCIS ROCHE, ARTHUR J. SANTRY, JR., and FG DOE, EN ROE and JB LOE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPPOSING BRIEF OF RESPONDENTS COMBUSTION ENGINEERING, INC., C-E CAST EQUIPMENT, JAMES F. CALVERT, GEORGE E. FISHER, JR., EDWIN M. KAVANAGH, JAMES B. KELLY, JAMES E. KLIMA, THOMAS E. McGRANAHAN, WILLIAM FRANCIS ROCHE, and ARTHUR J. SANTRY, JR.

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals correctly held that petitioners' civil rights claims were barred by the applicable statute of limitations.

II. Whether the Court of Appeals correctly held that the *Noerr-Pennington* doctrine barred petitioners' claims of antitrust violations arising out of respondents' providing information to the Cuyahoga County prosecutor regarding theft of respondents' proprietary engineering drawings, in light of petitioners' consequent prosecution, indictment and guilty pleas to receiving stolen property and conversion of trade secrets.

II.

LIST OF PARTIES AND RULE 28.1 STATEMENT

Respondent Combustion Engineering, Inc. ("Combustion") is a Delaware corporation headquartered in Stamford, Connecticut. Respondent C-E Cast Equipment ("C-E Cast") is a division of Combustion located in a suburb of Cleveland, Ohio [Complt., ¶¶5, 6(a), Pet. App. 108].[1] Eight present or retired officers and employees of the two corporate entities were also named as defendants, along with Lawrence K. Hubbell, President of Royalton Manufacturing Company, which manufactured parts for petitioner Western Reserve Group [Complt., ¶¶7-15, A. 111-2].

Combustion is a publicly held corporation whose stock is traded on the New York Stock Exchange. It has no affiliations that must be reported under Supreme Court Rule 28.1.

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[1] References to Petitioners' Appendix to Petition for Writ of Certiorari will herein be by page number prefixed "A."

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STATUTES AND REGULATIONS INVOLVED

This action involves the following statutes:

1. The Sherman Act, 15 U.S.C. §§1, 2 [A. 136].

2. The Civil Rights Act of 1871, 42 U.S.C. §1983 [A. 136].

3. Conversion of Trade Secrets, Ohio Rev. Code §1333.51 [Respdt. App. 1[2]].

4. Time Limitations, Certain Torts, Ohio Rev. Code §2305.09 [R. 3].

5. Time Limitations, Bodily Injury or Injury to Personal Property, Ohio Rev. Code §2305.10 [R. 4].

6. Time Limitations, Certain Actions, Ohio Rev. Code §2305.11 [R. 5].

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9. Possessing Criminal Tools, Ohio Rev. Code §2923.24 [R. 8].

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[2] References to Respondents' Appendix will herein be page number prefixed "R."

STATEMENT OF THE CASE

A. C-E Cast is a manufacturer of foundry molding equipment and "make" type replacement parts for that equipment.

C-E Cast manufactures foundry molding equipment which forms parts for incorporation into motor vehicles, farm machinery and similar equipment. It also manufactures "make" type replacement parts, according to confidential drawings. Any person who wanted to manufacture and sell "make" type parts would have to have C-E Cast's proprietary engineering details. Except in rare emergency situations, it was the practice of C-E Cast *not* to provide its engineering drawings to a customer. Pursuant to C-E Cast's published policy, any employee who gave such drawings to a third party would be terminated.

B. C-E Cast learned that customers were being offered "make" type replacement parts manufactured from proprietary drawings.

In mid-July 1981, C-E Cast received an anonymous letter that claimed that C-E Cast "has been bilked out of" spare parts sales by transfer of "C-E Cast's proprietary drawings." At about the same time, C-E Cast became aware that its proprietary "make" type parts were being offered to at least three established customers. C-E Cast learned from these customers that an outside organization was indicating that it could provide "make" type parts for C-E Cast equipment [Complt., ¶19; A. 112].

C. C-E Cast retained a professional agency.

In August of 1981, C-E Cast engaged Niam Investigations [Complt., ¶20; A. 113], a professional organization, to investigate the possible use of its confidential information, drawings and data by present or former employees in an improper or illegal manner. The Niam investigation eventually showed that C-E Cast drawings were being removed from the company by C-E Cast employees, copied and sent to various small manufacturers, including respondent Hubbell. These manufacturers were producing "make" type replacement parts which were being offered for sale to C-E Cast's customers. Specifically, former employee Lester Smith and his company, Western Reserve Group, were using confidential C-E Cast drawings to compete with C-E Cast.

D. Results of investigation were provided to the county prosecutor, who obtained a search warrant, criminal indictments, and guilty pleas.

Upon completion of the investigation, C-E Cast provided its results to the Cuyahoga County Prosecutor [Complt., ¶27, A. 114], who took charge of further proceedings. Thereafter C-E Cast provided assistance to the prosecutor at his request.

In early December, 1981, an affidavit for a search warrant was prepared by the county prosecutor [Complt., ¶28, A. 114] and on December 7, search warrants were issued out of the Cuyahoga County and Summit County Common Pleas Courts [Complt., ¶30, A. 115]. On December 8, 1981, after a search of petitioner Smith's house and other locations, the Sheriff's Department confiscated various documents [Complt., ¶¶32, 40, A. 115, A. 117].

In January of 1982, petitioner Lester W. Smith was named in a four-count indictment [Complt., ¶¶70-71, A. 124] charging him with theft or conversion of trade secrets [Ohio Rev. Code §1333.51, R. 1]; criminal simulation [Ohio Rev. Code §2913.32, R. 6] receiving stolen property [Ohio Rev. Code §2913.51, R. 7] and possession of criminal tools [Ohio Rev. Code §2923.24, R. 8]. Petitioner Western Reserve Group waived indictment and accepted an information charging a violation of conversion of trade secrets under Ohio Rev. Code §1333.51 [R. 1] [Complt., ¶73(2), A. 125].

On January 13, 1984, pursuant to a plea agreement between Lester Smith and the prosecutor, petitioner Lester Smith entered a plea of guilty to the misdemeanor of receiving stolen property of a value less than $150.00, a lesser and included offense in Count III of the indictment. The plea arrangement further provided that Smith, on behalf of petitioner Western Reserve Group, would enter a plea of guilty to a violation of Ohio Rev. Code §1333.51 [R. 1], conversion of trade secrets (a fourth degree felony).

Lester Smith was fined $1,000.00, given a suspended six-month jail sentence and placed on probation for one year. Western Reserve Group was fined $5,000.00.

Lester Smith and Western Reserve Group instituted this litigation on November 18, 1985, charging in Count I a violation of his civil rights under 42 U.S.C. §1983 [A. 136] and charging in Counts II and III antitrust violations under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2 [A. 142].

REASONS WHY THE PETITION SHOULD BE DENIED

The petition should be denied because the claims asserted were correctly dismissed by the District Court and those dismissals were affirmed by the Sixth Circuit Court of Appeals on the authority of decisions of this Court and the Court of Appeals.

A. The Court of Appeals correctly held that Petitioners' civil rights claims were barred by the applicable statute of limitations.

In Count I of his Complaint, petitioner Smith alleged that defendants violated his civil rights "in concert or conspiracy with persons acting under color of state law" when a member of the Sheriff's Department for Summit County, Ohio, presented a search warrant to petitioner at his home on December 8, 1981, and proceeded to conduct a search and seizure of documents relating to petitioners' business [Complt., ¶¶34-45, A. 116-19]. The District Court and Court of Appeals held that the §1983 claims were barred by Ohio's one-year statute of limitations for certain torts (including malicious prosecution), Ohio Rev. Code §2305.11(A) [R. 5].

In *Wilson v. Garcia*, 471 U.S. 261 (1985), this Court held that federal courts should apply the state statute of limitations for personal injury claims to §1983 claims. This Court has just ordered the Sixth Circuit to reconsider its application of Ohio's one-year statute of limitations for intentional torts in light of this Court's recent decision, *Owens v. Okure*, 488 U.S. _____, 57 U.S.L.W. 4065 (Jan. 10, 1989). *Thomas v. Shipka*, 488 U.S. _____, (U.S. Jan. 23, 1989) (No. 87-1384). In *Thomas*, the plaintiff's claim was timely if

Ohio's two-year general personal injury statute were applied. But that statute does not aid petitioners. As noted by the Sixth Circuit herein:

> Even if this court should conclude upon rehearing that *Mulligan v. Hazard* [777 F.2d 340 (6th Cir. 1985), *cert. denied*, 476 U.S. 1174 (1986)] was incorrectly decided insofar as it selected Ohio's one-year statute of limitations rather than the two-year statute, such a decision would not benefit the plaintiffs. The plaintiffs waited until nearly four years after their alleged §1983 cause of action accrued before filing their complaint. As the *Mulligan* court points out, Ohio's catch-all four-year statute of limitations, Ohio Rev. Code §2305.09(D), does not apply to §1983 actions. 777 F.2d at 343 n.4.

A. at 5.[3]

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[3] While disapproving the application of state statutes of limitation governing intentional torts, *Owens* also reaffirmed *Wilson's* rejection of "catch-all" statutes of limitation as applicable to §1983 claims. 57 U.S.L.W. at 4609, n. 11. *Owens* instructs courts to apply the personal injury statute which "either explicitly or by judicial construction" applies to unspecified personal injury claims. *Id.* Ohio's highest court recently held that Ohio Rev. Code §2305.10 (two-year period for any "action for bodily injury or injury to personal property"), applies to unspecified personal injury actions. *Hunter v. Shenango Furnace Co.*, 38 Ohio St. 3d 235, 527 N.E.2d 871 (1988) (general two-year statute, rather than one-year statute for specified intentional torts, applied to intentional tort of employer that did not "clearly indicate a battery or any other enumerated intentional tort in the Revised Code. . . ." (Syllabus)). A remand in this case would be a vain act because: 1) the only statute under which Smith's claim could be timely is Ohio's four-year "catch-all" statute for certain actions (Ohio Rev. Code §2305.09(D) [R. 3]), and 2) that statute is not applicable under this Court's holding in *Wilson*, as interpreted by the Sixth Circuit in *Mulligan* and reaffirmed in *Owens*.

B. The Court of Appeals correctly held that the *Noerr-Pennington* Doctrine barred petitioners' claims of antitrust violations arising out of respondents' providing information to the Cuyahoga County Prosecutor regarding the theft of respondents' proprietary engineering drawings, in light of petitioners' consequent prosecution, indictment and guilty pleas to receiving stolen property and converting trade secrets.

Petitioners argue that *Noerr-Pennington* immunity should not include a party's resort to the courts. Pet. at 17-18. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. _____, 108 S.Ct. 1931 (1988), cited by petitioners, holds that the standard-setting process of a private association was *not* a "governmental" action, and re-affirms that " '[W]here a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action,' those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint." 108 S.Ct. 1936 *quoting, Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1967). Petitioners also cite *Patrick v. Burget*, 486 U.S. _____, 108 S.Ct. 1658 (1988), where this Court held that physicians' activities on peer review committees did not constitute "state action" subject to *Parker v. Brown* immunity.

Neither of these cases suggests the need for review in this case. Respondents invoked governmental enforcement of criminal statutes. As stated by the District Court below, "the actions of the related defendants here are precisely those which fall under the *Noerr-Pennington* doctrine." [A. 29].

The Sixth Circuit further correctly held that under the allegations of petitioners' own complaint, the prosecution could not be construed as " 'a pattern of baseless, repetitive claims' or 'abuse of processes' necessary to constitute sham activity . . . or . . . create an inference of such." *Potters Medical Center v. City Hosp. Ass'n*, 800 F.2d 568, 579 (6th Cir. 1986), *quoting, California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972).

After learning that an unknown supplier was selling replacement parts which could be made only with respondents' proprietary drawings, respondents hired an investigator, who located "C-E Cast Equipment documents . . . [i]ncluding over seventy detailed drawings" along with checks signed by former employee Lester W. Smith in the possession of a company manufacturing the replacement parts [Complt., ¶25, A. 114]. This information was turned over to the Cuyahoga County Prosecutor [*Id.*, ¶28, A. 114]. Pursuant to a court-ordered search warrant [*Id.*, ¶30, A. 115], a search was conducted by the Sheriff's Department of Summit County [*Id.*, ¶39-40, A. 117]. A four-count indictment was issued by the grand jury of Cuyahoga County [*Id.*, ¶70, A. 124], and Lester Smith and his company, Western Reserve Group, Inc., pled guilty to receiving stolen property and criminal conversion of trade secrets [*Id.*, ¶73, A. 125-26].

The very concern which led to respondents' investigation—theft of C-E Cast's trade secrets—was vindicated in the guilty pleas. The prosecution by governmental officials, initiated after an independent evaluation of the evidence by a county prosecutor and a search conducted under the authority of a warrant issued by a court, cannot, under any interpretation of petitioners' allegations, rise to a pattern of baseless claims or sham sufficient to overcome the strong constitutional rights which give rise to *Noerr-Pennington* immunity.

C. Petitioners' collateral issues raise no question of import.

At pages 25-26, petitioners apparently take issue with the Sixth Circuit's affirmation of the trial court's holding that petitioners did not allege a continuing violation which would toll the §1983 statute of limitations. As the District Court explained:

> The conduct that forms the basis of the §1983 claim was a discreet [sic] incident that occurred on December 8, 1981—the search and seizure of the plaintiffs' property. The effects of that isolated incident do not constitute a continuing violation for the purposes of tolling the running of the statute of limitations.

[A. 25]. The courts below properly applied this Court's precedent and petitioners do not indicate any argument or authority to the contrary.

Finally, the issues sought to be raised by petitioners at pages 26 and 27 of their petition relate to an order issued by the trial court after petitioners had already appealed to the Sixth Circuit. The Sixth Circuit dismissed the appeal, holding that the underlying order was entered without jurisdiction [A. 49-52]. Those issues are therefore not before this Court.

CONCLUSION

Respondents were the victim of petitioners' confessed crimes. To argue that their cooperation in the prosecution of the criminals is a sham, not based on any genuine desire for judicial relief, or a violation of civil rights, is a perversion of our criminal system.

Nothing in the unpublished opinion issued by the Sixth Circuit merits this Court's review.

Respectfully submitted,

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APPENDIX

Ohio Rev. Code §1333.51. Conversion of trade secrets; prohibition; definitions.

(A) As used in this section:

(1) "Article" means any object, material, device, or substance, or copy thereof, including any writing, record, recording, drawing, sample, specimen, prototype, model, photograph, blueprint or map.

(2) "Representing" means describing, depicting, containing, constituting, reflecting, or recording.

(3) "Trade secret" means the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, or improvement, or any business claims, financial information, or listing of names, addresses, or telephone numbers, which has not been published or disseminated, or otherwise become a matter of general public knowledge. Such scientific or technical information, design, process, procedure, formula, or improvement, or any business plans, financial information, or listing of names, addresses, or telephone numbers is presumed to be secret when the owner thereof takes measures designed to prevent it, in the ordinary course of business, from being available to persons other than those selected by the owner to have access thereto for limited purposes.

(4) "Copy" means facsimile, replica, photograph, or reproduction of an article, or any note, drawing, or sketch made of or from an article.

(B) No person shall, with intent to deprive or withhold from the owner thereof the control of a trade secret, or with intent to convert a trade secret to his own use or the use of another, obtain possession of or access to an article representing a trade secret.

(C) No person, having obtained possession of an article representing a trade secret or access thereto with the owner's consent, shall convert such article to his own use or that of another person, or thereafter without the owner's consent make or cause to be made a copy of such article, or exhibit such article or another.

(D) No person shall, by force, violence, threat, bribe, reward, or offer of anything of value on or to another person or member of his family, obtain or attempt to obtain from such other person an article representing a trade secret.

(E) No person shall, without authorization, enter upon the premises of another with intent to obtain possession of or access to an article representing a trade secret.

Ohio Rev. Code §2305.09. Four years; certain torts.

An action for any of the following causes shall be brought within four years after the cause thereof accrued:

(A) For trespassing upon real property;

(B) For the recovery of personal property, or for taking or detaining it;

(C) For relief on the ground of fraud;

(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.

If the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered.

Ohio Rev. Code §2305.10. Bodily injury or injury to personal property; when certain causes of action arise.

An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.

For purposes of this section, a cause of action for bodily injury caused by exposure to asbestos or to chromium in any of its chemical forms arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure, or upon the date on which, by the exercise of reasonable diligence, he should have become aware that he had been injured by the exposure, whichever date occurs first.

For purposes of this section, a cause of action for bodily injury incurred by a veteran through exposure to chemical defoliants or herbicides or other causative agents, including agent orange, arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure.

As used in this section, "agent orange," "causative agent," and "veteran" have the same meanings as in section 5903.21 of the Revised Code.

For purposes of this section, a cause of action for bodily injury which may be caused by exposure to diethylstilbestrol or other nonsteroidal synthetic estrogens, including exposure before birth, arises upon the date on which the plaintiff learns from a licensed physician that he has an injury which may be related to such exposure, or upon the date on which by the exercise of reasonable diligence he should have become aware that he has an injury which may be related to such exposure, whichever date occurs first.

Ohio Rev. Code §2305.11(A). Time limitations for bringing certain actions.

(A) An action for libel, slander, malicious prosecution, false imprisonment, or malpractice, including an action for malpractice against a physician, podiatrist, hospital, or dentist, or upon a statute for a penalty or forfeiture, shall be brought within one year after the cause thereof accrued, provided that an action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation, or liquidated damages by reason of the nonpayment of minimum wages or overtime compensation, shall be brought within two years after the cause thereof accrued.

If a written notice, prior to the expiration of time contained in this division, is given to any person in a medical claim that an individual is presently considering bringing an action against that person relating to professional services provided to that individual, then an action by that individual against that person may be commenced at any time within one hundred eighty days after that notice is given.

Ohio Rev. Code §2913.32. Criminal simulation.

(A) No person, with purpose to defraud, or knowing that he is facilitating a fraud, shall do any of the following:

(1) Make or alter any object so that it appears to have value because of antiquity, rarity, curiosity, source, or authorship, which it does not in fact possess;

(2) Practice deception in making, retouching, editing, or reproducing any photograph, movie film, video tape, phonograph record, or recording tape;

(3) Utter, or possess with purpose to utter, any object which he knows to have been simulated as provided in division (A)(1) or (2) of this section.

(B) Whoever violates this section is guilty of criminal simulation, a felony of the fourth degree.

Ohio Rev. Code §2913.51. Receiving stolen property (1982 version).

(A) No person shall receive, retain, or dispose of property of another, knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense.

(B) Whoever violates this section is guilty of receiving stolen property, a misdemeanor of the first degree. If the value of the property involved is one hundred fifty dollars or more ... receiving stolen property is a felony of the fourth degree. ...

Ohio Rev. Code §2923.24. Possessing criminal tools.

(A) No person shall possess or have under his control any substance, device, instrument, or article, with purpose to use it criminally.

(B) Each of the following constitutes prima-facie evidence of criminal purpose:

(1) ***

(2) Possession or control of any substance, device, instrument, or article designed or specially adapted for criminal use;

(3) Possession or control of any substance, device, instrument, or article commonly used for criminal purposes, under circumstances indicating such item is intended for criminal use.

(C) Whoever violates this section is guilty of possessing criminal tools, a felony of the fourth degree.